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In the Supreme Court of the United States

October Term, 1956

OTTAWA HUNTING ASSOCIATION, INC., a corporation,
Appellant,

vs.

THE STATE OF KANSAS and HAROLD R. FATZER, Attorney General of Kansas, and ROSS BEACH, JR., HOWARD M. GILLESPIE, CHARLES E. KAUP, VERN R. MAYO, HUGH MILLER and FRANK F. YOUNG, members of the Forestry, Fish & Game Commission of Kansas, and COLBURN C. HOLMES, PAUL KEITH and JOHN R. SMITH, Commissioners,
Appellees.

On Appeal from the Supreme Court of the State of Kansas.

STATEMENT AS TO JURISDICTION

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Appellees.

On Appeal from the Supreme Court of the State of Kansas.

No. .....

STATEMENT AS TO JURISDICTION

In compliance with Rule 13 (2) of the Rules of the Supreme Court of the United States, appellant submits herewith its statement showing the basis on which the Supreme Court has jurisdiction on appeal to review the judgment of the Supreme Court of the State of Kansas in this cause.

Opinions Below

The opinion and judgment of the Supreme Court of Kansas is reported in 178 Kansas at page 460 and 289 P. (2d) at page 754. It appears at pages 92-98 of the transcript and is reproduced as Appendix A hereto. The comments, findings of fact, and conclusions of law of the District Court of Linn County, Kansas, are not reported but were a part of the record before the Supreme Court of Kansas and appear at pages 64-74 of the transcript and are further reproduced as Appendix B.

Basis of Jurisdiction

The judgment of the Supreme Court of Kansas, affirming the judgment of the District Court of Linn County, Kansas, refusing to enjoin the enforcement of the Kansas Forestry, Fish and Game Law, was entered on November 12, 1955. Notice of Appeal was filed on March 7, 1956.

The Supreme Court of Kansas is the court of last resort in the State of Kansas (Constitution of Kansas, Article 3, Secs. 1 and 3; Secs. 60-3302, 60-3303 G. S. Kan. 1949).

The cause is one in which the validity of the Kansas Forestry, Fish and Game Law (Secs. 32-101 through 32-226 G. S. Kan 1949 and Sec. 74-3302 G. S. Kan. 1955 Supp.) was drawn in question on the ground of its being repugnant to the Constitution of the United States and the decision was in favor of its validity. This Court has jurisdiction on appeal under 28 U.S.C. 1257(2).

Statute Involved

The statute, the validity of which was drawn in question, is the Forestry, Fish and Game Law of the State of Kansas (Secs. 32-101 through 32-226 G. S. Kan. 1949 and Sec. 74-3302 G. S. Kan. 1953 Supp.) which authorizes the con-

demnation of privately owned lands in order to effectuate the purposes of said law and which, in particular, delegates to the Forestry, Fish and Game Commission the administration of said law. The Commission is further empowered and authorized by said statute to interpret the provisions of said law and within its own discretion to effectuate the purposes of said law through the condemnation of privately owned lands. Violation of the law is declared a misdemeanor punishable by a fine. The text of the statute here applicable is reproduced as Appendix C hereto.

Nature of the Case

The appellant, Ottawa Hunting Association, Inc., is a non-profit corporation organized and existing under the laws of the State of Kansas. Prior to April 5, 1954, and presently, said corporation was and still is the record owner and in lawful possession of certain tracts of land located in Linn County, Kansas, which are far removed from any town or city. Said tracts of lands, many years prior to the commencement of this cause, were converted by the members of the Ottawa Hunting Association into lands specifically designed and adaptable for use as a duck hunting club, and said lands have at all times since their acquisition by appellant been exclusively so used.

On or about April 5, 1954, the State of Kansas, appearing by Harold L. Fatzer, the Attorney General, and a defendant in this cause, filed in the District Court of Linn County, Kansas, a proceeding for the appointment of commissioners to appraise and assess damages by reason of the condemnation of certain lands in Linn County, Kansas, including the lands of appellant hereinbefore referred to. In said proceeding the petition filed further alleged that the duly appointed, qualified and acting members of the Forestry, Fish and Game Commission of Kansas had de-

termined and ordered that it was necessary to appropriate by condemnation proceeding said tracts and parcels of land. By order made and entered on April 6, 1954, the Judge pro tem of the District Court of Linn County, Kansas, appointed defendants Colburn C. Holmes, Paul Keith and John R. Smith commissioners to view and appraise the tracts sought to be condemned and to make a full and complete report thereof to the aforesaid court.

On May 13, 1954, the appellant filed with the District Court of Linn County, Kansas, its petition against the defendants in this cause to enjoin the condemnation of its lands on the ground that the purpose of the condemnation was to convert appellant's property into a public hunting ground, substituting public hunters for the members of appellant who were already devoting the land to the same purpose; that the Forestry, Fish and Game Laws of the State of Kansas upon which the commission relied, and specifically Section 32-212 of the General Statutes of Kansas, 1949, authorize the condemnation of land only for the expressed statutory purpose "to protect and propagate the * * * bird life * * * of the state, and to establish * * * refuges and preserves for the same" (*infra*, pp. 36-37); that the Legislature of the State of Kansas thus gave the Forestry, Fish and Game Commission power to condemn land for the purpose of protecting and propagating ducks and not for the purpose of killing them; that duck hunting is not incidental to establishing refuges for them but is the antithesis of giving them refuge and therefore exactly contrary to the statutory grant of the power of eminent domain; and that the constitutions of the State of Kansas and of the United States do not permit the condemnation of land to be devoted to duck hunting for the reason that such use is a private use and not a public use. It is not the contention of appellant that the members of the For-

estry, Fish and Game Commission of the State of Kansas may not condemn land for a proper purpose—that is to protect and propagate wild fowl and to establish refuges and preserves for same—but that they may not arrogate to themselves the power to establish public hunting grounds by means that have no sanction under the Kansas statute authorizing the exercise of the power of eminent domain by the Commission nor under the constitutions of the State of Kansas and of the United States.

Pursuant to motion filed on the same date by appellant the said court granted a temporary restraining order on May 13, 1954, restraining the condemnors and commissioners from taking any further action in the proceeding filed by the State of Kansas on April 5, 1954. On May 14, 1954, the aforementioned restraining order was modified by the aforesaid Judge pro tem so that the temporary restraining order should apply only to the lands of the appellant sought to be condemned by the defendants. On June 28, 1954, the defendants filed answers denying the unconstitutionality of the statute involved in this cause under the Constitution of the United States or the Constitution of the State of Kansas. The defendants further answered that the condemnation of appellant's lands by the defendants herein, and in particular the Forestry, Fish and Game Commission of Kansas, was a lawful exercise of the judgment and discretion vested in them by statute.

This cause, together with a companion suit consolidated for purposes of trial, came on regularly for trial in the District Court of Linn County, Kansas, on June 24, 1954, without jury. In addition to the foregoing facts, which were undisputed, there were additional findings of fact by the court (Transcript pp. 64-69; *infra* pp. 26-33). Thereafter the court entered, *inter alia*, the following conclusions of law (Transcript pp. 72, 73; *infra* pp. 33-34).

"1. The development of the area by the cooperating agencies is for a public use.

2. The defendants are acting within the scope of their authority and in good faith.

3. At the appropriate time the respondents lodged a demurrer to the plaintiffs' evidence and the Court took the same under advisement subject to further consideration and the Court does now sustain the demurrer of the respondents in each of the three consolidated cases.

4. Should the Court have overruled the demurrer and considered the evidence of the respondents including that disclosed by cross-examination, nothing is found which adds strength to the plaintiffs' case and the finding would be for the respondents.

5. The petitions for injunction are denied and costs apportioned and charged against the respective plaintiffs."

Upon the foregoing findings and conclusions the court rendered judgment denying the petition of appellants and assessing costs against appellants.

In accordance with state procedure, appellants appealed to the Supreme Court of Kansas, and on November 12, 1955, that Court rendered its opinion and entered judgment affirming the trial court (Transcript pp. 93-98; *infra* pp. 15-24). The decision of the Supreme Court of Kansas was as follows (Transcript, 92; *infra pp.* 15, 16).[1]

"1. The power of eminent domain is inherent in the state, and the legislature may authorize the acquisition and appropriation of private property for a public use provided the owner is compensated therefor.

[1]By state statute the Supreme Court of Kansas is required to set forth in a syllabus the law determined by the court (Secs. 20-203, 60-3329, G. S. Kan. 1949). Quoted above is the syllabus constituting the decision of the Supreme Court of Kansas in this case.

2. Where both a public and private use are to be made of property sought to be condemned, and the private use is the dominant, outstanding or more important object of the condemnation, the proceeding must fail; but if the private use to be made of the property is inconsequental compared to the public use, or subordinate thereto to the extent that it can be said to be only an incident thereof, then the fact that such private use is to be made of the property will not defeat the condemnation.

3. In actions by landowners to enjoin an arm of the state from exercising the right of eminent domain with respect to their property, the record is examined and it is *held*: Under all the facts set forth, and for the reasons stated in the opinion, injunctive relief was properly denied."

As indicated in the opinion of the Supreme Court of Kansas, the defendants contended principally that properly regulated and controlled hunting of waterfowl by the public is a public use and further, even though duck hunting be considered a private use and purpose, such hunting would be merely a permissible incident to the primary use of the property as a refuge (Transcript p. 96; *infra* p. 23). The opinion of the court furthermore was based solely upon the aforementioned contentions of the defendants as the court held that the use of lands as a public duck hunting area is a public use as the right to hunt ducks is inherent in all people. (Transcript p. 97; *infra* p. 23). Finally, the said court ruled there was nothing inconsistent between a program of conservation and propagation of migratory waterfowl on the one hand and regulated and limited hunting on the other hand. In so ruling, the Supreme Court of Kansas has therefore necessarily also held (1) that the condemnation of private lands by administrative officials and within their discretion

can validly be enforced by a state; (2) that the standards contained in the Kansas Forestry, Fish and Game Law are sufficiently definite to be enforced by an administrative tribunal; (3) that sufficient judicial review is available under the Kansas Forestry, Fish and Game Law with respect to the taking of privately owned lands by administrative officials through the exercise of eminent domain; and (4) that the taking of privately owned lands by administrative officials through the exercise of eminent domain for use as a public duck hunting ground is a valid exercise of the authority conferred upon them by the Kansas Forestry, Fish and Game Law as it constitutes a taking of lands for a public use.

The Constitutional Questions

This appeal presents the following questions under the Constitution of the United States:

1. Whether the Forestry, Fish and Game Law of the State of Kansas, which authorizes administrative officials within their discretion to acquire private lands by condemnation proceedings for the establishment of public hunting and shooting grounds, is invalid on its face as repugnant to the guarantee of due process contained in the Fourteenth Amendment to the Constitution of the United States.

2. Whether under the Kansas Forestry, Fish and Game Law (as construed by the Supreme Court of the State of Kansas) the available judicial review of the action of the Kansas Forestry, Fish and Game Commission is so inadequate as to render the said Law invalid as repugnant to the due process guarantee contained in the Fourteenth Amendment to the Constitution of the United States.

3. Whether the statutory standards for the condemnation of private lands, as applied by the Kansas Forestry, Fish and Game Commission and affirmed by the Supreme Court of Kansas as a basis for acquiring the private lands of the appellant, are by that application given a construction so broad, vague and indefinite as to render the said standards and each of them invalid as repugnant to the guarantee of due process contained in the Fourteenth Amendment to the Constitution of the United States.

4. Whether the acquiring of appellant's lands by the State of Kansas, and in particular the Forestry, Fish and Game Commission of said State, through the exercise of the power of eminent domain for the purpose of devoting said lands of appellant to a private use as distinguished from a public use, constitutes a violation of the guarantee of due process contained in the Fourteenth Amendment to the Constitution of the United States.

The Questions Are Substantial

1. As this Court is fully aware, the power of eminent domain is a power inherent in the sovereign and is neither conferred nor vested by constitution or statute. It is in fact in express derogation of the rights conferred upon individuals by constitution or by statute. In these circumstances the uniform judicial rule of interpretation requiring a strict construction of the statute purporting to confer the power of eminent domain or the limits of such power in derogation thereof is too well known and too familiar to this Court to require the citation of authority.

As a necessary prerequisite to the exercise of the right of eminent domain it is equally well established that the purposes of the exercise of such power must be to effectuate a public purpose or a public use. The particular

purpose of the Kansas Forestry, Fish and Game Commission in condemning the private lands of the appellant which are far removed from any town or city is to devote such lands to use as a public duck hunting ground thereby substituting another group of sportsmen for the appellants. The appellant submits it is, therefore, obvious that the aforementioned Commission will not devote appellant's lands to a purpose necessary and essential to the public welfare, i.e., public buildings, roads, schools, drainage projects, public utility use, parks and playgrounds in congested areas, etc. The sole object and purpose of the instant condemnation must, therefore, be recognized as neither necessary nor essential to the public welfare, but rather a convenient benefit to that portion of the public inclined from time to time to engage in the sport of killing ducks.

The decision of the Supreme Court of Kansas in this cause is a matter of first impression in such state (Transcript p. 96; *infra* p. 21). The decision, however, is directly in conflict with the decision of the Supreme Court of Florida in *Peary-Wilson Lumber Co., et al.* v. *Brevard County, et al.*, 159 Fla. 311, 31 S. (2d) 483, 486 (July 18, 1947). In this latter case upon facts identical in every material respect to those here involved the Supreme Court of Florida held (p. 486):

> "To take one man's property, against his will—at public expense, and make it available to a group who may have the leisure and inclination to hunt and fish constitutes a private rather than a public use."

The decision of the Supreme Court of Kansas in this cause and the decision of the Supreme Court of Florida above referred to are the only decisions of record which we have been able to find passing upon this precise question. The appellant submits that the decision of the Su-

preme Court of Florida is the proper rule and that of the lower court in this cause is erroneous. The question of law is furthermore not only a matter of dispute between the highest courts of two sovereign states but such question will remain unsettled until resolved by the decision of this Court.

2. The basic question involved in this cause is in fact the expediency or propriety of the act of the State of Kansas and the members of the Kansas Forestry, Fish and Game Commission in condemning the private land of the appellant for use as a public hunting and shooting ground. There is no provision in the Constitution of the State of Kansas nor in the legislative enactments of said state permitting appellant access to the courts of said state to obtain judicial review of the discretionary acts of the aforesaid Commission in condemning the private lands of the appellant for a public hunting and shooting ground. *State ex rel. Mitchell* v. *State Highway Commission,* 163 Kansas 187, 182 P. (2d) 127; *Breedlove* v. *Commissioners of Wyandotte County,* 127 Kansas 754, 275 P. 379; *De Priest* v. *Camp,* 101 Kansas 810, 168 P. 872.

3. The private lands of the appellant are sought to be condemned by the State of Kansas and the members of the Kansas Forestry, Fish and Game Commission under the authority of Section 32-215 of the General Statutes of Kansas, 1949, and Section 74-3302 General Statutes of Kansas, 1955 Supp. The former statutory section confers upon the aforesaid Commission the power to establish, maintain and provide for sanctuaries in which game, game birds, etc., may breed or rest and replenish hunting and trapping grounds or fishing waters and further to establish, maintain and improve recreational grounds for the purpose of affording recreational facilities to the citizens of the state. The latter statutory sec-

tion confers authority upon the said Commission to acquire private lands by condemnation proceedings in order to effectuate the purposes of the Kansas Forestry, Fish and Game Law.

The legislature of the State of Kansas, in enacting the Kansas Forestry, Fish and Game Law, provided no statutory standards to guide the Forestry, Fish and Game Commission of Kansas in the condemnation of private lands in order to effectuate the purposes of the law. The Commission, therefore, is seeking in the exercise of a discretionary judgment unlimited by statute to condemn the private lands of the appellant for use as public duck hunting grounds under the authority of the Kansas Forestry, Fish and Game Law. The Supreme Court of Kansas has ruled in this cause that this action of the said Commission is not only proper but in accordance with the authority conferred upon it by the said statute. This decision of the Kansas Supreme Court is, therefore, directly opposed to the decision of the Arkansas Supreme Court in *Hampton* v. *Arkansas State Game and Fish Commission*, 238 S. W. (2d) 950, 954. The facts as well as the statute in each case are similar in every material respect. The Arkansas Supreme Court, however, denied a right of condemnation in the state or an agency thereof under the applicable statute, stating (p. 954):

> "In the light of the evidence and the rules concerning eminent domain, as previously stated, we have no hesitancy in holding that Amendment No. 35 does not give the Commission power of eminent domain to establish a public hunting ground. The words of the Amendment are: '* * * control, management, restoration, conservation and regulation of * * * wildlife * * *.' The plan here is to kill ducks; and killing is certainly the antithesis of restoration and conservation. Neither can killing be said to be con-

> trol, management or regulation. When read in the light of the letter and spirit of the Amendment No. 35, it is reasonably clear that ducks will not be conserved or restored by the establishment of a public hunting area. The Commishion, in its control of wildlife, may include 'hatcheries, sanctuaries, refuges, reservations'. A public shooting ground can hardly be likened to any of these."

The decision of the Supreme Court of Kansas in this cause and the decision of the Arkansas Supreme Court in the case above referred to are the only decisions of record we have been able to find upon this precise question. The appellant contends that the decision of the court below is erroneous and the conflicting decision of the Supreme Court of Arkansas is correct. The question, however, involved in both decisions will remain in dispute until resolved by the decision of this Court.

4. There is no dispute in the record in this cause that the Kansas Forestry, Fish and Game Commission will devote the private lands of appellant subject to condemnation proceedings to use as a public duck hunting area (Transcript p. 71; *infra* pp. 28, 30-32). The Supreme Court of Kansas has ruled that the condemning of the private lands of appellant for use as a public duck hunting ground is in accordance with statutory authority and is lawful and proper. Such decision is, therefore, in direct conflict with the decision of the Florida Supreme Court in *Peavy-Wilson Lumber Co., et al.* v. *Brevard County, et al., supra,* and the Supreme Court of Arkansas in *Hampton, et al.* v. *Arkansas State Game and Fish Commission, supra.* The appellant contends that the decision of the lower court in

this cause is erroneous and that the proper ruling is as stated by the Arkansas Supreme Court and the Supreme Court of Florida.

Respectfully submitted,

James C. Wilson

John J. Hasburgh

WATSON, ESS, MARSHALL & ENGGAS,
Of Counsel.

Appendix A

No. 39,761

OTTAWA HUNTING ASSOCIATION, INC., a corporation, *Appellant,*

vs.

THE STATE OF KANSAS and HAROLD R. FATZER, Attorney General of Kansas, and ROSS BEACH, JR., HOWARD M. GILLESPIE, CHARLES E. KAUP, VERN R. MAYO, HUGH MILLER and FRANK F. YOUNG, members of the Forestry, Fish & Game Commission of Kansas, and COLBURN C. HOLMES, PAUL KEITH and JOHN R. SMITH, Commissioners, *Appellees.*

No. 39,762

STELLA THOMPSON, *Appellant,*

vs.

THE STATE OF KANSAS and HAROLD R. FATZER, Attorney General of Kansas, and ROSS BEACH, JR., HOWARD M. GILLESPIE, CHARLES E. KAUP, VERN R. MAYO, HUGH MILLER and FRANK F. YOUNG, members of the Forestry, Fish & Game Commission of Kansas, and COLBURN C. HOLMES, PAUL KEITH and JOHN R. SMITH, Commissioners, *Appellees.*

Syllabus by the Court

1.

The power of eminent domain is inherent in the state, and the legislature may authorize the acquisition and appropriation of private property for a public use provided the owner is compensated therefor.

2.

Where both a public and private use are to be made of property sought to be condemned, and the private use is the dominant, outstanding or more important object of the condemnation, the proceeding must fail, but if the private use to be made of the property is inconsequential compared to the public use, or subordinate thereto to the extent that it can be said to be only an incident thereof, then the fact that such private use is to be made of the property will not defeat the condemnation.

3.

In actions by landowners to enjoin an arm of the state from exercising the right of eminent domain with respect to their property, the record is examined and it is *held*: Under all the facts set forth, and for the reasons stated in the opinion, injunctive relief was properly denied.

Appeals from Linn district court; HARRY W. FISHER, judge. Opinion filed November 12, 1955. Affirmed.

Douglas Hudson of Fort Scott, and *Oscar S. Brewer* of Kansas City, Missouri, argued the cause, and *Howard Hudson* and *Douglas G. Hudson*, both of Fort Scott, were with them on the briefs for the appellants.

Paul E. Wilson, Assistant Attornel General, argued the cause, and *Harold R. Fatzer*, Attorney General, and *Noel Mullendore*, of Howard, *John H. Morse*, of Mound City, and *Harry C. Blaker*, of Pleasanton, were with him on the briefs for the appellees.

The opinion of the court was delivered by

PRICE, J.: These consolidated cases were injunction actions by landowners to enjoin an arm of the state from exercising the right of eminent domain with respect to their property.

Plaintiffs have appealed from orders sustaining demurrers to their evidence and denying injunctive relief.

The questions involved in the two cases are identical, and our decision will apply to both. The discussion will concern the action by Ottawa Hunting Association, Inc., a corporation, plaintiff in case No. 39,761.

In April, 1954, pursuant to G. S. 1949, 32-213, the Forestry, Fish and Game Commission of the state (hereinafter referred to as commission), acting through the attorney general, presented to the judge of the district court of Linn County a petition asking for the condemnation of tracts of land belonging to numerous landowners, including Ottawa Hunting Association, Inc., a corporation, plaintiff and appellant herein. A brief summary of the contents of that petition is found in *State* v. *Boicourt Hunting Ass'n,* 177 Kan. 637, 282 P. 2d 395, in which it was held that a landowner may not, in a condemnation proceeding, litigate the validity of the proposed condemnation and the right to appropriate property.

However, we have no question of procedure in the case now before us, for on May 13, 1954, plaintiff filed the instant action to enjoin the commission from appropriating its land.

A temporary restraining order was issued and we are advised that the status quo has continued to this date.

In a summary way it may be said the theory of plaintiff's petition is that the authority of the commission to condemn land exists only by virtue of and is limited by statute; that under applicable statutes the commission may appropriate land *only* for the purpose of establishing fish and/or game *preserves, refuges* and *sanctuaries;* that the condemnation proceeding is in fact an attempt on the part of that body to acquire lands for the purpose of establishing public *hunting* and *shooting grounds* on which

bird life, game, waterfowl and wild life may be *hunted* and *destroyed;* that such proposed use is not a public use or for a public purpose and is contrary to the wording and intent of the statutes, and that if the statutes in question be so construed as to authorize the condemnation proceeding in question they are unconstitutional and invalid under the constitution of the state and constitute a denial of due process of law under the fourteenth amendment to the federal constitution.

The answer alleges that the condemnation proceeding was commenced in good faith and in the lawful exercise of the considered judgment of the commission, and denies the invalidity of the proceeding as alleged by plaintiff.

Upon the issues thus joined the parties proceeded to trial.

In view of the narrowed issue involved it is unnecessary to summarize the evidence in detail. In a general way the facts established are as follows:

The over-all project in question is known as the Marais des Cygnes Waterfowl Refuge Area, and, as planned by the commission, in cooperation with federal agencies, would consist of about 8,000 acres, 3,600 acres of which had previously been acquired. The condemnation proceeding in question was for the purpose of acquiring the remaining 4,400 acres, included in which is the tract of 233 acres owned by plaintiff and which had been used by its members for some years as a private hunting grounds. The condemnation was commenced pursuant to the adopttion of an appropriate resolution by the commission. Dependent upon a number of factors, approximately 3,200 acres are to be inundated, and, when completed, also dependent upon a number of factors, *not to exceed fifty per cent of the water area is to be opened to public shooting,* regulated, however, by applicable state

and federal laws and regulations pertaining to migratory waterfowl, and the like. In other words, it is planned to make the entire project into a game and wild life preserve with limited and regulated public duck shooting permitted on not to exceed one-half of the water area as in the opinion and consideration of the commission conditions warrant. Fishing would be allowed on the entire water area.

At this point reference should be made to certain applicable statutes.

G. S. 1949, 32-212, declares it to be the policy of the state to protect and propagate the fish, bird life (other than predatory and destructive birds), game and fur-bearing animals of the state, and to establish, from time to time, refuges and preserves for the same.

G. S. 1949, 32-213, confers upon the commission the right of eminent domain in acquiring necessary lands, water and water rights, and for carrying out the purposes for which the commission was created.

G. S. 1949, 32-214, authorizes the commission to take and acquire, in the name of the state, by donation, purchase, or through condemnation proceedings, title to lands for the purpose of establishing, improving, keeping and maintaining the same as public forestry, recreational grounds, fish and/or game preserves.

G. S. 1949, 32-215, confers upon the commission the power to establish, maintain and provide for sanctuaries in which game, game birds, fur-bearing animals and fish may breed or rest and replenish hunting and trapping grounds or fishing waters; to establish, maintain and improve recreational grounds for the purpose of affording recreational facilities to the citizens of the state, and to extend or consolidate lands or waters, or both, suitable for any of such purposes as the commission may desire.

G. S. 1953, Supp. 74-3302, among other things, provides for the rule-making power of the commission with respect to the enforcement of rules and regulations concerning the use and occupancy of land and property under its control, and authorizes the commission to provide and develop facilities for outdoor recreation.

In sustaining the commission's demurrer to plaintiff's evidence and denying injunctive relief, the trial court held that the commission had acted within the scope of its authority and in good faith, and that the development of the area in question, in cooperation with federal agencies, *is for a public use* and therefore valid.

In this court the gist of plaintiff's argument is that the extent of the commission's power and authority to exercise the right of eminent domain is to acquire land on which to establish a *preserve* or *refuge* for game and waterfowl; that to permit public *shooting*, even though regulated, is the direct antithesis of maintaining a *preserve, refuge* or *sanctuary;* and further, that hunting ducks is a *private* purpose as contrasted to a public purpose and, therefore, the acquisition of land for such alleged *private* purpose, even though full compensation be paid, is beyond constitutional and statutory limitations on the right of eminent domain. In other words, it is contended the commission has no power to appropriate private property for the purpose of creating a duck-hunting grounds.

The commission, on the other hand, contends that its appropriation of the land in question is for a public purpose; that properly regulated and controlled hunting of waterfowl by the public on public property is a *public* use of state lands, and, further, even though duck hunting be considered a *private* use and purpose, such hunting as here contemplated would be merely an *incidental*

use of the property as contrasted to its *primary* public use.

One of the basic principles of our form of government is that no person can be deprived of his property except by due process of law, and it is equally fundamental that the legislature possesses no power to authorize the appropriation of one's property for a private use or purpose. It is equally well settled that the legislature may authorize the acquisition and appropriation of private property for a public use provided the owner is compensated therefor. (*Irrigation Co.* v. *Klein*, 63 Kan. 484, 65 Pac. 684; *State, ex rel.*, v. *City of Topeka*, 176 Kan. 240, 270 P. 2d 270.) The power of eminent domain, that is, the right to take private property for public use, is inherent in a state and is not one granted by our constitution. (*Glover* v. *State Highway Comm.*, 147 Kan. 279, 285, 77 P. 2d 189.) An examination of authorities discloses that through the years it has been impossible for courts to define comprehensively the concept of a public use and to formulate a universal test, due, no doubt, to the diversity of local conditions and circumstances in an inevitably changing world.

The precise question presented here is *one of first impression in this state*. Plaintiff calls our attention to several decisions from other jurisdictions, among them being *Hampton* v. *Arkansas State Game & Fish Commission*, 218 Ark. 757, 238 S. W. 2d 950, to the annotation found at 172 A. L. R. 174, as being persuasive on the proposition that the acquisition of private property for a public hunting or fishing grounds is not for a public use. However, a close examination of those authorities discloses either factual dissimilarities or that eminent domain was attempted to be exercised under statutory authority different from ours.

After a most careful consideration of the question involved, we are of the opinion that this case was correctly decided in the court below. In so concluding we are not shutting our eyes to the fact that in many isolated instances the exercise of eminent domain appears to work a hardship upon the private property owner and oftentimes seems to be unjust, irrespective of the fact full compensation is paid. However, once the object sought is within the authority of the legislature, the right to realize it through the exercise of eminent domain is clear, for the power of eminent domain is merely the means to the end.

As heretofore shown, the legislature has declared it to be the policy of the state to protect and propagate fish, bird life, game and fur-bearing animals, and to establish and maintain refuges and preserves for the same within the state. Together with the authority to establish preserves, the commission also is authorized to establish, maintain and improve *recreational grounds* for the purpose of affording recreation facilities to the citizens of the state. In *State, ex rel.*, v. *Atherton*, 139 Kan. 197, 30 P. 2d 291, this court, in discussing one phase of the forestry, fish and game act, said:

> "Some of the purposes of the act are doubtless intended to mean works pertaining to the improvement and beautification of the state's own property—its fish and game preserves. These may fairly be regarded as *public improvements* which the constitution does not forbid." (p. 209.)

It is true the question here under consideration was not involved in that case, but we quote the above statement as throwing light on the over-all proposition.

Reducing the matter down to the specific facts before us, it, of course, must be conceded that, *literally* speaking,

the act of *killing* ducks is not *preserving* them or providing them with a *refuge* or *sanctuary*. It also may be conceded that from the standpoint of human nature, sport and relaxation, duck hunting may, in a sense, be classified as that of a *private* purpose or endeavor, depending upon the whims and inclinations of the individual. Nevertheless, looking at the matter from the over-all standpoint, we think it must be conceded that the *right* to hunt ducks is inherent in all people, and, therefore, must be considered as a *public* purpose. In other words, hunting may be *personal* to the individual who does it, but the *right* to go hunting is *public*.

And there is still another reason why, in our opinion, the judgment of the trial court must be upheld. Assuming, solely for the sake of argument, that duck hunting is a private use and purpose, the fact remains that when the over-all purpose, nature, size and character of the proposed project is taken into consideration, the conclusion is inescapable that the duck hunting here involved would amount to nothing more than an *incidental* use of the entire project, rather than the *primary* use, notwithstanding the fact that in its *present* status and ownership duck hunting undoubtedly has been the *primary* use to which plaintiff's members have put the specific property. In *Smouse* v. *Kansas City S. Rly. Co.*, 129 Kan. 176, 282 Pac. 183, following the rule laid down in *Irrigation Co.* v. *Klein, supra,* it was said:

> "Appellant argues that this evidence discloses that a private use as well as a public use is to be made of this property and that this renders the condemnation proceeding unlawful. It is well settled, of course, that even when a party has the right of eminent domain he cannot condemn the private property of an individual for the private use of another who does not possess the right of eminent domain. It is also quite

> well settled that where both a public and a private use is to be made of the property sought to be condemned and the private use is the dominant, outstanding, or more important object of the condemnation, the proceeding must fail, * * * But if the private use to be made of the property is inconsequential compared to the public use, or subordinate thereto to the extent that it can be said to be only an incident thereof, then the fact that such private use is to be made of the property will not defeat the condemnation." (p. 186.)

We think the rule there stated is very applicable to the situation before us. Furthermore, there is nothing in the case to indicate that regulated and limited hunting on a portion of the entire project is not entirely consistent with a program of conservation and propagation of migratory waterfowl. In fact, common everyday experience and knowledge tell us that the two are consistent.

Much more on the subject could be said, but limitation of time and space forbids. All contentions advanced by plaintiff in the thorough presentation of its case have been examined and considered, but we are forced to the conclusion that the attempted exercise of the right of eminent domain is not unlawful on any of the grounds asserted. The judgment of the trial court is therefore affirmed.

Appendix B

No. 39,761

OTTAWA HUNTING ASSOCIATION, INC., a corporation,
Appellant,

vs.

THE STATE OF KANSAS and HAROLD R. FATZER, Attorney General of Kansas, and ROSS BEACH, JR., HOWARD M. GILLESPIE, CHARLES E. KAUP, VERN R. MAYO, HUGH MILLER and FRANK F. YOUNG, members of the Forestry, Fish & Game Commission of Kansas, and COLBURN C. HOLMES, PAUL KEITH and JOHN R. SMITH, Commissioners, *Appellees.*

No. 39,762

STELLA THOMPSON, *Appellant,*

vs.

THE STATE OF KANSAS and HAROLD R. FATZER, Attorney General of Kansas, and ROSS BEACH, JR., HOWARD M. GILLESPIE, CHARLES E. KAUP, VERN R. MAYO, HUGH MILLER and FRANK F. YOUNG, members of the Forestry, Fish & Game Commission of Kansas, and COLBURN C. HOLMES, PAUL KEITH and JOHN R. SMITH, Commissioners, *Appellees.*

Findings of Fact.

1. The above captioned actions were consolidated for trial for the reason that both the issues and the evidence in all of the cases were substantially the same and this decision is a decision in each of the cases.

2. These cases arise out of the fact that each of the plaintiffs owns real estate which the respondents and defendants are attempting to take by eminent domain as a part of a large acreage which is being acquired by eminent domain for the purpose of developing and operating

a waterfowl, game and fish refuge and sanctuary and recreational grounds and public forestry.

3. In 1952 the Forestry, Fish & Game Commission of the State of Kansas, in cooperation with the United States Department of the Interior, Fish and Wildlife Service, undertook the promotion and development of this preserve which in its entirety is designated to include about 8,000 acres of land along the Marais des Cygnes River between La Cygne and Pleasanton in Linn County, Kansas.

4. This territory has from its earliest history been a low-lying, marshy territory. It lies near Trading Post, one of the earliest permanent settlements by the white man, in what is now the State of Kansas. In fact, the river having been explored in this locality derives its name, "Marais des Cygnes," from French words meaning "the marshes of the swans." In earlier days much of the acreage involved was covered by shallow water and water grasses suitable for waterfowl habitat and was much used by migratory waterfowl as a nesting place, as a refuge and resting place.

5. Agricultural development and the laying out of public highways and drainage incident thereto, coupled with successive years of less than normal rainfall have caused the normal water supply and marshy condition of the region to disappear. In fact, at the time of trial there was no water whatever upon any of the lands of the plaintiffs utilized as hunting grounds for migratory waterfowl.

6. It is the decision of the cooperative agencies by appropriate methods to again impound some 3,000 or 4,000 acres of water upon the lands undertaken to be appropriated. In doing this the lands of the plaintiffs would as a result of the engineering practices be inundated.

7. On April 18, 1952, the Kansas agency in an appropriate proceedings undertook this cooperative development and authorized its Director to proceed with the necessary engineering and preliminary studies incident to the development of the area and with authority to deal with the Federal agency for the purpose of completing the acquisition, development and operation of the project. The action referred to the project as "a Federal Aid Project under the Pittman-Robertson Act, and further, provided that one-half of the water area may be opened to hunting, and the entire water area opened to fishing."

This was followed under date of June 23, 1952, by a formal offer and on July 17, 1952, formal acceptance of the project as a joint undertaking between the two agencies for the acquisition, development and operation of this project. The agreement itself provides, "said project is proposed as a means of promoting efficient management of fish and wildlife resources, and will be executed under the provisions of said Acts and said rules and regulations." The standard regulations of the Federal agency at the time of the agreement contained the following, "1432. Public Shooting Grounds. The acquisition and development of public shooting grounds as a means of harvesting game crops must be of secondary consideration—only incidental to the main purposes of any project. The obvious intent of the act is to use the tax on sporting arms and ammunition collection from sportsmen to provide better sport for the hunter, but this must be by harvesting the annual crop and not merely providing places where existing stocks of game can be further depleted. Because of the migratory nature of waterfowl, sanctuaries are important in the restoration program. Therefore, on areas to be acquired or developed for waterfowl, it is essential that the refuge feature be mutually agreed upon."

8. In the contract the needs of the proposed acquisition were, "under normal conditions there is an absence of sizeable migratory waterfowl flights across eastern Kansas, because of a lack of areas suitable for waterfowl concentrations."

"The proposed project would create much needed feeding and resting habitat which would attract greater numbers of migratory waterfowl through the area."

The contract further provides, "fifty per cent of the area would be set aside as a refuge." "Wildlife would be given complete protection in the refuge portion. Protection would be in accord with state and Federal regulations in areas open for public hunting." "Impounding waters will be developed for fishing where it will not interfere with management of the area for waterfowl."

9. There are four hunting clubs which own land near the center of the development which lands have been used for many years for hunting migratory waterfowl in season. There has also been some limited fishing upon the grounds. Each of these four hunting clubs are resisting the acquisition of their lands. One, the Boicourt Hunting Association, in a proceedings in the original condemnation action and an appeal is now pending in the Supreme Court from orders in that case incident to their property. The other three are the plaintiffs in the three consolidated actions. The lands of the three hunting clubs in these actions are contiguous and involves some 524 acres near the center of the proposed 8,000 acre development. Also, the Boicourt Hunting Association owns an additional ..... acres adjacent thereto.

10. The lands of the plaintiffs are necessary in the full development of the project and the lands will be covered with water caused by the impounding developments.

11. Following the confirmation of the agreement between the cooperative state and Federal agencies on July

17, 1952, the state agency proceeded with the acquisition by eminent domain of approximately the south half of the said development including 3,679 acres of land. That proceedings is now fully completed, the lands acquired, the owners compensated therefor and there are no appeals pending from the first proceedings.

12. In 1954 the state agency instituted the present proceedings for the acquisition of the remaining acreage of approximately 4,393 acres adjacent to the first acquired acreage which would bring the total to 8,072 acres and it is this second condemnation proceedings which is attacked by the plaintiffs in these suits.

13. On February 4, 1954, the Kansas Commission in a proper proceeding resolved, reciting at considerable length its purpose in "establishing, providing, improving, keeping and maintaining of the area * * * as a waterfowl, game and fish refuge and sanctuary, recreational grounds and public forestry," and requested the Attorney General of the State of Kansas to institute appropriate proceedings.

14. Following this action of the State Commission the Attorney General instituted in the District Court of Linn County, Kansas, a proceedings involving among many others the plaintiffs' lands.

15. These petitions are the same in all essential parts after alleging the names and ownerships of the lands in the plaintiffs and after alleging that the defendants are the Attorney General of the State of Kansas and members of the Forestry, Fish and Game Commission of the State of Kansas and the three commissioners appointed by the court to make appraisals. The petitions continue to allege by citation the Kansas statutes under which the plaintiffs are assuming to act and then further allege that the statements contained in the condemnation proceedings are, "false and untrue," and said condemnation proceed-

ings are not authorized by the laws of the State of Kansas under which said agencies are acting for the reason that "the purpose of the institution of the proceedings is not to acquire lands to devote to the protection and propagation of wildlife * * * but for the purpose of devoting the land so acquired to the establishment of public hunting and shooting grounds whereupon bird life, game, waterfowl and wildlife may be hunted and destroyed."

That the laws of the state do not authorize eminent domain for the purpose of establishing "public hunting and shooting grounds."

That the usage of the land in maintaining public hunting and shooting grounds is not a public use so that the same cannot be acquired by the process of eminent domain.

It is further alleged that if the law is construed to authorize such development that it would be unconstitutional.

Plaintiffs allege they are threatened by irreparable harm and injury and pray for a permanent injunction against the moving parties.

16. The action is one praying injunction against public officers assuming to act in their official capacity.

17. The plaintiffs, of course, had and assumed the burden of proof in the trial and the plaintiffs introduced in evidence all of the minutes of the Forestry, Fish and Game Commission of the State of Kansas dealing with this project and the contract between the state and Federal agencies which have been referred to and quoted from in these findings.

18. Portions of the natural lakes have been used as hunting grounds by non-resident hunting clubs since about the year 1900. Of more recent years other clubs have developed portions of the lands to retain more water and

more clubs have acquired property, the latest being the Ottawa Hunting Association which has been established since 1942 or 1943. When the water is low the properties of the plaintiffs are separated by dry land areas, but when the water is reasonably high they are all joined together. The dikes and developments of the water areas have been done and paid for by private citizens.

19. Tracts designated as 95 owned by Baker-Hall, et al.; tract 93 owned by Stella Thompson, and tract 53-A owned by the Boicourt Hunting Association were not included in the first draft of the maps made with reference to the total condemnation but were included in a subsequent drafting and after conferences held by the Fish and Game Commission with members of other hunting clubs whose lands had been included in the first draft. Many meetings and conferences were held by different members of the hunting clubs with individual members of the State Commission and appearances were made before the Commission as a whole. Testimony was offered with reference to a number of these conversations but in all of them the sum and substance of the statements by the different members of the Commission, the Director and the individual members of the Commission was to the effect that 50 per cent of the condemned area would be used as a refuge for migratory birds and that "harvesting" of migratory birds would be permitted if favorable conditions developed on sections or parts of the condemned lands up to 50 per cent of the water area. Public shooting on these areas would be allowed only in accordance with the laws and regulations relative to hunting and taking of wildlife as applicable to the State of Kansas as a whole. In other words, while the Commission has authority to restrict shooting to less than that authorized by law generally, it has no authority to extend shooting be-

yond that which is authorized generally in the State of Kansas.

20. The Commission has at this time made no rules or regulations allowing any shooting whatever of wildlife upon the project. They have made no plans for the development of duck blinds or to the facilities for shooting waterfowls.

21. The shooting or harvesting of waterfowl under the rules of the Federal agency and the state agency upon the developed area is and will be secondary and incidental to the development of the entire area for the purposes hereinbefore indicated.

22. After the plaintiffs' evidence was introduced the respondents interposed a demurrer which the Court took under advisement and thereupon the respondents, without prejudice to any of their rights, introduced evidence. Testimony of several members of the Fish and Game Commission and of the Director was introduced but it added nothing to the evidence of the plaintiffs already introduced and was in the nature of a reaffirmance of the matters as set out in the resolutions and contracts which had been introduced by the plaintiffs. Their reaffirmance of their good faith added little, if anything, to the presumption of their actions in this respect as disclosed by the resolutions and contracts as offered by the plaintiffs. Cross-examination of respondents' witnesses brought out nothing new except more detail as to the many meetings and conversations between the plaintiffs and the various members of the Commission. Nowhere in plaintiffs' evidence, defendants' evidence or cross-examination was it asserted that the Commission intended to use more than 50 per cent of the water area for public shooting at any time.

23. Cross-examination brought out the fact of determined resistance on the part of the plaintiffs, the many

meetings hereinbefore referred to, local pressures brought by local residents to the effect that if their farm lands were to be condemned for this preserve that the lands of the non-resident gun clubs should also be included and the fact that some of the hunting clubs insisted that if their properties were taken, all of the properties of the hunting club should be taken. Naturally, where so large an acreage is condemned and the lands of privately and locally owned agricultural enterprises were taken and farmers dispossessed from their homes, considerable "heat" was generated. Also, the owners of these hunting clubs vigorously resisted and stated that they would contest the matter to the highest court in the land. They have, of course, the perfect right to do this and they are not condemned for so doing. After all, to own a private duck hunting lake in the midst of an 8,000-acre wildlife preserve would be something of a "sportsman's paradise." However, all of the competent evidence introduced with reference to the taking of the various lands and hunting properties is that these properties were all needed from the standpoint of successful engineering practices and developments as planned by the cooperating agencies.

24. During the trial certain evidence was received by the Court subject to objection of counsel and further consideration by the Court. The Court does now overrule all such objections and considers all of the evidence admitted under that ruling. All definite rulings made under the evidence in the trial of the case stand.

Conclusions of Law.

1. The development of the area by the cooperating agencies is for a public use.

2. The defendants are acting within the scope of their authority and in good faith.

3. At the appropriate time the respondents lodged a demurrer to the plaintiffs' evidence and the Court took the same under advisement subject to further consideration and the Court does now sustain the demurrer of the respondents in each of the three consolidated cases.

4. Should the Court have overruled the demurrer and considered the evidence of the respondents including that disclosed by cross-examination, nothing is found which adds strength to the plaintiffs' case and the finding would be for the respondents.

5. The petitions for injunction are denied and the costs apportioned and charged against the respective plaintiffs.

COMMENT.

Plaintiffs in these cases were placed in a difficult situation. They had the burden to prove the allegations of their petition and met the further legal proposition that they were asking an injunction against public officers operating within the scope of their authority. The theory of the plaintiffs' case is that the Commission did not mean what they resolved in their meetings and in their contracts with the Federal agency but had the ulterior motive of taking the private hunting grounds of the plaintiffs from them and opening them up as public hunting grounds. Of course, if that were established, the same could not be done through the process of eminent domain. However, the evidence did not bear out or warrant that argument. The plaintiffs themselves made reference to all of the acts of the legislature relevant to the condemnations. They introduced the resolutions of the Commission. They introduced the contract between the Federal agency and the State Commission. They failed to introduce any evidence of bad faith or that the Commission contemplated anything further than was shown on the face of the pro-

ceedings and the records offered in evidence. The points then for the Court to determine clearly resolved around this proposition, is it legal for the State of Kansas through its designated agencies to take this land by eminent domain for the purposes stated in the resolutions when, as an incident thereto, a certain portion of the land so taken under certain conditions was to be opened for the hunting and harvesting of waterfowl? Plaintiffs cite certain cases from other jurisdictions where the courts have held that condemnation could not be had of grounds to be used for public hunting, but an examination of those cases reveals that the facts in each case were very different from those involved here and also the statutory enactments were different.

A very clear and correct statement of the law applicable to situations such as are disclosed in these cases is found in The Lake Loon Navigation, Reservoir and Irrigation Company vs. J. J. Klein, 63 Kan. 484-497:

> "There is no question but that, if a private use is combined with a public one in such way that the two could not be separated, the right of eminent domain may not be invoked to aid the joint enterprise. We mean by this that the two purposes must together exist as main, or principal, ones; but where the private purpose is simply an incident, and the public use the principal, then the incident will not destroy or defeat the principal. That boats may be sailed upon an irrigation reservoir, or that fish may live therein, does not destroy or interfere with its use for irrigation. What is the principal, and what the incident, might in some cases become a question of fact, to be determined by the proper triers of questions of fact. It has even been held that, in determining whether the proposed use was public or private, courts are not confined to the description of the objects and purposes of the corporation as set forth in its articles

of incorporation, but may resort to evidence aliunde showing the actual business proposed to be conducted by it."

Irrigation Co. vs. Klein
63 Kan. 484-497

Appendix C

The statute, the validity of which was drawn in question, is the Forestry, Fish and Game Law of the state of Kansas, Secs. 32-212, 32-213, 32-214, 32-215, 32-221, 32-222 and 32-226, G. S. Kan. 1949 and Sec. 74-3302, G. S. Kan. 1955 Supp., which read as follows:

32-212. *Policy of state to protect fish, bird life and game animals; refuges and preserves.* It is declared to be the policy of the state of Kansas to protect and propagate the fish, bird life (other than predatory and destructive birds), game and fur-bearing animals of the state, and to establish from time to time refuges and preserves for the same.

32-213. *Eminent domain; power granted to forestry, fish and game commission.* That for the purpose of acquiring the necessary lands, water and water rights for the carrying out of the provisions of this act, and the purposes for which said commission is created, the said commission, in the name of the state of Kansas, shall have and exercise, and there is hereby conferred upon it, the same rights of eminent domain as are conferred by law upon cities in the acquisition of land or water for waterworks; and upon request of said commission, the attorney general shall proceed by proper action to acquire by condemnation all lands or rights therein or thereon, and all water and/or water rights required by said commission.

32-214. *Public forestry, recreation grounds, fish and game preserves; powers of commission.* That the commission hereby created shall have power and

authority to take and acquire in the name of the state, by donation, devise or bequest, or by purchase or through condemnation proceedings, except as hereinbefore provided, title to lands, including any and all rights therein or thereon, water and water rights, for the purpose of establishing, improving, keeping and maintaining the same as public forestry, recreational grounds, fish and/or game preserves; to acquire or provide for the building and construction of reservoirs, lakes, dams, or embankments for impounding water on such public forestry, recreational grounds, fish and game preserves or elsewhere; to provide for the planting of forest trees on such public forestry, recreational grounds, fish and game preserves; to provide for the establishment and maintenance of sub-fish hatcheries and game farms for the propagation of fish, game, game birds and other birds and fur-bearing animals, within and upon such forestry, fish and game preserves and elsewhere; to provide for keeping, maintaining and improving such public forestry, recreational grounds, fish and game preserves; to establish such public forestry, recreational grounds, fish and game preserves at such place or places within this state as shall, in the judgment of the commission, be most suitable to carry out the intents and purposes of this act; to supervise building and construction work of all kinds, of the planting of forest trees, and all improvements of said public preserves, including the power to contract relative to improvements and upkeep of roads in and about said forestry preserves and recreational grounds; and generally shall have power to do any and all things necessary and proper to carry out the intents and purposes of this act.

32-215. *Rules and regulations authorized under 1927 act; temporary game reserve by proclamation, publication; penalty for violating proclamation; general authority of forestry, fish and game commission.* The commission is hereby authorized to make and publish such rules and regulations and establish such

service as it may deem necessary to carry out the provisions of this act and may designate as a temporary game reserve or zone where hunting, fishing or trapping is forbidden for a period of one year or less. Such designations shall be by proclamation and such proclamation shall designate an area not to exceed one county in any one proclamation. Such proclamation shall be published in not less than five different newspapers of general circulation published in said county, or if there be less than five newspapers published in said county then in all such newspapers published in said county. The commission shall print copies of such proclamation to the number of one per cent of the population of such county designated as a game reserve and deliver the same to the county clerk of said county, to be by said clerk given to any person requesting a copy of said proclamation. The commission shall further post or cause to be posted at various places through such reserve, signs advising that such place is a temporary game reserve, stating the date of beginning and expiration of the period during which said county or part thereof is declared to be a reserve. Anyone violating the provisions of such proclamation shall upon conviction be fined not less than five dollars ($5) nor more than fifty dollars ($50), and at the discretion of the court forfeit his license. This act is supplemental to any existing laws pertaining to game reserves, license or licenses. And the commission shall have authority: (a) To establish open or closed seasons on any species of game, game birds or other birds, fish and fur-bearing animals in any specified locality or localities; and to fix bag limits, creel limits, season limits, size limits, weight limits, quality limits (on furs), rest days, or other conditions governing the taking of game, game birds and other birds, fur-bearing animals and fish at any and all times; to regulate the buying and selling of pelts, and fur-bearing animals, including live rabbits, in the state; provide for the keeping of records, which shall

be open to inspection of those connected with the director of the forestry, fish and game commission's service. To fix an annual license fee of not more than fifty dollars ($50) nor less than five dollars ($5) for such dealers in pelts or live rabbits, and require a license to be procured prior to engaging in such business. (b) To establish, maintain and provide for sanctuaries, in which game, game birds and other birds, fur-bearing animals and fish may breed or rest and replenish hunting and trapping grounds and water or fishing waters. (c) To establish, maintain and improve recreational grounds for the purpose of affording recreational facilities to the citizens of Kansas. (d) To extend and/or consolidate lands or waters, or both, suitable for any of the purposes provided for in this act, and to exchange lands or waters, or both, for other lands or waters, or both, which said commission may desire. (e) To capture, propagate, transport, sell, exchange, give or distribute any species of game, game birds, fur-bearing animals or fish, or all of them, needed for stocking or restocking any lands or waters in this state: *Provided,* That the power to capture any species of game, game birds, fur-bearing animals or fish or all of them for any purpose, shall not apply to private property except by permission of the owners thereof. (f) To provide against fire and storm damage to the matters and things under the control and jurisdiction of the commission. (g) To enter into cooperative agreement with persons, firms, corporations or governmental agencies for any purposes consistent with the purposes and provisions of this act. (h) To conduct research in conservation methods and disseminate information for the public good from time to time. (i) All power and authority heretofore vested by law in the fish and game warden shall be vested in the forestry, fish and game commission, except as herein otherwise provided, and all duties which by law have heretofore devolved upon the fish and game warden shall devolve upon the said commission, to be

by said commission, at its discretion, delegated to the director of the forestry, fish and game commission.

32-221. *Acquisition of additional lands adjoining state lakes and parks.* That whenever in the judgment of the members of the forestry, fish and game commission it becomes necessary to purchase additional adjacent property for the purpose of protecting, adding to, and improving state lakes, parks, and recreation grounds as provided in section 8 (32-214) of chapter 221 of the Laws of Kansas for 1927 (section 32-214 of the Revised Statutes, Supp. for 1930), and all acts and parts of acts supplementary thereto, said commission shall have the right in the name of the state of Kansas to acquire and purchase, enter upon, take, use and appropriate such property; and there is hereby conferred upon said commission the same rights of eminent domain as are conferred by law upon cities in the acquisition of land or water for waterworks; and upon request of said commission the attorney general shall proceed by proper action to acquire by condemnation such property or rights therein, as to the commission may seem necessary.

32-222. Such taking declared a public use; disposition. The taking, using and appropriating by the right of eminent domain, as in this act provided, of property for the purpose of protecting, adding to, and improving state lakes, parks, and recreational grounds for the purpose of protecting such state lakes, parks and recreational grounds, their environs, the preservation of the view, appearance, light, air, health, and usefulness thereof, by reselling such adjoining property with such restrictions in the deeds of resale as will protect said property, so taken for the aforesaid purpose, is hereby declared to be taking, using and appropriating of such property for public use: *Provided, however,* That the proceeds arising from the resale of any such property, so taken, shall be used by the forestry, fish and game commission for the purpose of improving the state lake or lakes, park or parks, or recreational grounds to which such resold property adjoins.

32-226. *Same; misdemeanor.* Any person violating any provisions of this act or any regulation, adopted under authority of section 1 (32-224) of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than five dollars nor more than two hundred dollars.

74-3302. Director. Tenure; salary and expenses; qualifications; bond; assistants and employees; compensation; rules and regulations; investigations; gifts and property, eminent domain; game protectors; compensation; selection and qualifications; local preserve protectors; powers and authority of game protectors, sheriffs and deputy sheriffs. The commission shall appoint and employ a director of the forestry, fish and game commission who shall continue in office at the pleasure of the commission and who shall receive a salary of not more than seven thousand dollars ($7,000) per year to be determined by the commission, payable monthly, and the necessary and actual traveling expense. The director shall be selected with special reference to his training, experience, fitness and knowledge of the duties to be performed by him. The director shall give a bond running to the state of Kansas in the penal sum of five thousand dollars ($5,000) for the faithful and honest performance of the duties devolving upon him. The director shall appoint with the approval of the commission such assistants and employees as may be necessary to carry out the provisions of this act or of any laws of the state affecting the powers and duties of said commission. The compensation of all such assistants and employees and the number thereof shall be subject to the approval of the commission. The commission hereby created shall adopt such rules and regulations not inconsistent with the laws governing its organization and procedure and the administration of the provisions of this act as may be deemed expedient. Such commission may also make and enforce reasonable rules and regulations concerning the use and occupancy of land and property under its

control, may provide and develop facilities for outdoor recreation, may conduct such investigations as it may deem necessary for the proper administration of this act, and on behalf of the people of the state the commission may accept gifts and grants of land and other property and shall have authority to buy, sell and exchange or condemn land or other property for any of the purposes contemplated by this act. The commission shall make such rules and regulations for the protection of lands and property under its control against wrongful use or occupancy as will insure the carrying out of the intent of this act or to protect the same from depredation or to preserve such lands and property from molestations, spoliation, destruction or any other improper use thereof. Said director shall by and with the consent and approval of the commission, organize a game protective service and employ game protectors and classify them and fix their compensation which shall not exceed three hundred dollars ($300) per month, and their actual and necessary traveling expenses while in the performance of their official duties. The director shall with the approval of the commission appoint one or more county game protectors in each county. Such county game protectors shall be selected with special reference to their training, experience, fitness and knowledge of the duties to be performed by them. The county game protectors shall be residents of the county of their appointment and shall serve without salary. In addition to the above, the director may, with the approval of the commission, appoint local preserve protectors for the purpose of protecting and supervising fish and game on preserves under the jurisdiction of the forestry, fish and game commission. State game protectors, sheriffs and deputy sheriffs shall have the power and authority: (a) To enforce all the laws of the state relating to state parks, recreational areas, game, fish, fur bearers, wild birds and wild animals and the rules and regulations of the forestry, fish and game commission rela-

tive thereto; (b) to serve warrants and subpoenas issued for the examination, investigation or trial of all offenses against the laws and regulations relating to game, fish, fur bearers, wild birds and animals; (c) to carry firearms or weapons concealed or otherwise, in the performance of their duties.

No. 81

FILED
JUN 13 1956
HAROLD B. WILLEY, Clerk

In the Supreme Court
of the United States
October Term, 1956

OTTAWA HUNTING ASSOCIATION, INC., a corporation, *Appellant*,

vs.

THE STATE OF KANSAS AND HAROLD R. FATZER, Attorney General of Kansas, and ROSS BEACH, JR., HOWARD M. GILLESPIE, CHARLES E. KAUP, VERN R. MAYO, HUGH MILLER and FRANK F. YOUNG, members of the Forestry, Fish & Game Commission of Kansas, and COLBURN C. HOLMES, PAUL KEITH and JOHN R. SMITH, Commissioners, *Appellees.*

On Appeal from the Supreme Court of the State of Kansas

MOTION TO DISMISS OR AFFIRM

JOHN ANDERSON, JR.,
Attorney General
of the State of Kansas,
PAUL E. WILSON,
Assistant Attorney General
of the State of Kansas,
NOEL MULLENDORE,
Special Assistant Attorney General
of the State of Kansas,
Attorneys for Appellees.

26-4255

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In the Supreme Court
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OTTAWA HUNTING ASSOCIATION, INC., a corporation, *Appellant*,

vs.

THE STATE OF KANSAS AND HAROLD R. FATZER, Attorney General of Kansas, and ROSS BEACH, JR., HOWARD M. GILLESPIE, CHARLES E. KAUP, VERN R. MAYO, HUGH MILLER and FRANK F. YOUNG, members of the Forestry, Fish & Game Commission of Kansas, and COLBURN C. HOLMES, PAUL KEITH and JOHN R. SMITH, Commissioners, *Appellees.*

No. _____

On Appeal from the Supreme Court of the State of Kansas

MOTION TO DISMISS OR AFFIRM

Appellees in the above entitled case move to dismiss or affirm the above entitled appeal on the ground that it does not present a substantial federal question and that the judgment rests on an adequate non-federal basis.

The Constitutional Questions

The appellant herein attempts to present certain questions alleged to arise under the Constitution of the United States. These questions as set out in the appellant's Jurisdictional Statements are as follows:

> "1. Whether the Forestry, Fish and Game Law of the State of Kansas, which authorizes administrative officials within their discretion to acquire private lands by condemnation proceedings for the establishment of public hunting and shooting grounds, is invalid on its face as repugnant to the guarantee of due process contained in the Fourteenth Amendment to the Constitution of the United States.
>
> "2. Whether under the Kansas Forestry, Fish and Game Law (as construed by the Supreme Court of the State of Kansas) the available judicial review of the action of the Kansas Forestry, Fish and Game Commission is so inadequate as to render the said Law invalid as repugnant to the due process guarantee contained in the Fourteenth Amendment to the Constitution of the United States.
>
> "3. Whether the statutory standards for the condemnation of private lands, as applied by the Kansas Forestry, Fish and Game Commission and affirmed by the Supreme Court of Kansas as a basis for acquiring the private lands of the appellant, are by that application given a construction so broad, vague and indefinite as to render the same standards and each of them invalid as repugnant to the guarantee of due process contained in the Fourteenth Amendment to the Constitution of the United States.

"4. Whether the acquiring of appellant's lands by the State of Kansas, and in particular the Forestry, Fish and Game Commission of said state, through the exercise of the power of eminent domain for the purpose of devoting said lands of appellant to a private use as distinguished from a public use, constitutes a violation of the guarantee of due process contained in the Fourteenth Amendment to the Constitution of the United States."

The Questions Are Not Substantial

1. Appellant attempts to question the power of the Forestry, Fish and Game Commission of the State of Kansas to condemn lands for the establishment of "public hunting and shooting grounds." A review of this record will disclose that the power of condemnation is not here being invoked to acquire grounds for public shooting. Appellant seeks to inject into the case an issue not presented by the record. The purposes for which the lands in question are being acquired are fully set out in the resolution adopted by the Forestry, Fish and Game Commission on February 5, 1954, as follows:

"(1) For the purpose of establishing, providing, improving, keeping and maintaining of the area of approximately four thousand three hundred ninety-three and 09/100 (4393.09) acres, more or less, as a waterfowl, game and or fish refuge and sanctuary, recreational grounds and public forestry.

"(2) For the purpose of using part of said area

> for a service road, ditches and embankments for the establishing, providing, developing, improving and maintaining of said area as a game and/or fish refuge and sanctuary, recreational grounds and public forestry.
>
> "(3) For the purpose of protecting, adding to, improving and maintaining of the said area of thirty-six hundred seventy-nine (3679) acres, now acquired in the name of the State of Kansas, as a waterfowl, game and/or fish refuge and sanctuary, recreational grounds and public forestry."

A like purpose is alleged in the petition for condemnation filed before the District Judge of Linn County on April 6, 1954. It was the finding of the District Court of Linn County that the Commission was acting in good faith, within its authority conferred by law. (See Appendix B to Jurisdictional Statement, page 33.) Finally, the opinion of the Supreme Court of the State of Kansas would indicate that the primary purpose for which the lands are being taken was not the creation of a public shooting ground. Attention is respectfully drawn to the following comment of the Court, set out in Appendix A of the Jurisdictional Statement, at page 23:

> "Assuming, solely for the sake of argument, that duck hunting is a private use and purpose, the fact remains that when the over-all purpose, nature, size and character of the proposed project is taken into consideration, the conclusion is inescapable that the duck hunting here involved would amount to noth-

ing more than an *incidental* use of the entire project, rather than the *primary* use, notwithstanding the fact that in its *present* status and ownership duck hunting undoubtedly has been the *primary* use to which plaintiff's members have put the specific property. In *Smouse v. Kansas City S. Rly. Co.*, 129 Kan. 176, 282 Pac. 183, following the rule laid down in *Irrigation Co. v. Klein*, supra, it was said:

"'Appellant argues that this evidence discloses that a private use as well as a public use is to be made of this property and that this renders the condemnation proceeding unlawful. It is well settled, of course, that even when a party has the right of eminent domain he cannot condemn the private property of an individual for the private use of another who does not possess the right of eminent domain. It is also quite well settled that where both a public and a private use is to be made of the property sought to be condemned and the private use is the dominant, outstanding, the proceeding must fail, . . . But if the private use to be made of the property is inconsequential compared to the public use, or subordinate thereto to the extent that it can be said to be only an incident thereof, then the fact that such private use is to be made of the property will not defeat the condemnation.' (p. 186.)

"We think the rule there stated is very applicable to the situation before us. Furthermore, there is nothing in the case to indicate that regulated and limited hunting on a portion of the entire project is not entirely consistent with a program of conservation and propagation of migratory waterfowl. In fact, common everyday experience and knowledge tell us that the two are consistent."

Appellant's position here is the same that it has been throughout the litigation. That position is aptly described by the District Court as follows:

> "The theory of the plaintiff's cases is that the Commission did not mean what they resolved in their meetings and in their contracts with the Federal Agency but had the ulterior motive of taking the private hunting grounds of the plaintiff's from them and opening them up as public hunting grounds. Of course, if that were established, the same could not be done through the process of eminent domain. However, *the evidence did not bear out or warrant that argument.*" (Jurisdictional Statement, Appendix B, p. 34.) (Italics supplied.)

Appellant insists on ignoring the facts obvious to all others, and seek to litigate issues not in the case.

2. Appellant complains that neither the Constitution of the State of Kansas nor the legislative enactments of the state specifically give the appellant access to the courts to obtain judicial review of the acts of the Commission. The point cannot be well taken for the reason that in this very proceeding, appellant is in court and has had a judicial review of the discretionary acts of the Commission. The fact that the issue has been resolved against appellant does not detract from the availability of that review. We grant that under the Kansas statutes, as interpreted by the Supreme Court of the State, a condemnation proceeding is a

special statutory proceeding, and prior to taking an appeal from the award of the Commissioners, the provisions thereof neither contemplate nor comprehend the filing of pleadings challenging the validity of the condemnation proceedings. The effect of the statute, as interpreted by the Supreme Court, is that such a proceeding is not a judicial procedure prior to the making of an award and the taking of an appeal therefrom. However, the landowner is not without remedy to challenge the validity of such proceeding at any stage thereof. There is available to him common law and equitable remedies for the protection of his interests in the property sought to be condemned. He is not denied the right to go into a court at any stage of the proceeding and ask for injunctive relief challenging the right to take his property. (*State v. Boicourt Hunting Association*, 177 Kan. 637, 282 P. 2d 395.) The only inhibition is that he may not do so in the condemnation proceeding.

3. Appellant complains that the statutory standards for the condemnation of the private lands as applied by the Forestry, Fish and Game Commission are given construction so broad, vague and indefinite as to render such standards invalid as repugnant to the guarantee of due process contained in the Fourteenth Amendment. Again

appellant urges the point that the statute does not authorize the condemnation of public hunting grounds. Again we must point out that the power of eminent domain is not being exercised to condemn public hunting grounds. That issue was settled in the courts of Kansas. Moreover, we note that appellant appears to admit the validity of the statute for the purposes set out in the act. On pages 4 and 5 of the Jurisdictional Statement, the following statement occurs:

> "It is not the contention of appellant that the members of the Forestry, Fish and Game Commission of the State of Kansas may not condemn land for a proper purpose—but that they may not arrogate to themselves the power to establish public hunting grounds by means that have no sanction under the Kansas statute authorizing the exercise of the power of eminent domain by the Commission nor under the constitutions of the State of Kansas and of the United States."

This would appear to be a concession by appellant of the intrinsic validity of the statute. Mention is made of the appellant's conflict between the decision of the Arkansas Supreme Court in *Hampton v. Arkansas Fish and Game Commission*, 238 S. W. 2d 950. Appellee respectfully suggests that the two cases present vital points of distinction. The record in the Arkansas case reflected that the land sought to be taken was being condemned primarily and

foremost for the purpose of public hunting areas. In the instant case the record emphasizes that any hunting which may be permitted under conditions yet to be determined will be incidental to the primary purpose of maintaining a game refuge.

4. Complaint is made that the purpose for which the lands are here being taken constitutes a violation of the due process clause of the Fourteenth Amendment. Again we emphasize that the purpose for which these lands are being condemned is reflected by the record and not by the statements of the appellant. The primary purpose for which condemnation is instituted is to create a public game reserve and recreational area. Appellant cites no authority to support an argument that these are not proper public purposes.

CONCLUSION

For the reasons hereinbefore set forth, appellees respectfully urge that the within case should be dismissed or affirmed.

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PER

CURIAM

ported below: 194 Ohio St. 203, 125 N. E. 2d 401.

No. 81. OTTAWA HUNTING ASSOCIATION, INC., *v.* KANSAS ET AL. Appeal from the Supreme Court of Kansas. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *James C. Wilson* for appellant. *John Anderson, Jr.*, Attorney General of Kansas, *Paul E. Wilson*, Assistant Attorney General, and *Noel Mullendore*, Special Assistant Attorney General, for appellees. Reported below: 178 Kan. 460, 289 P. 2d 754.

No. 185. DULUTH, MISSABE & IRON RANGE RAILWAY